(23)

FILED

SEP 5 1942

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1942.

No. 372.

WILLIAM FOX,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

ABRAHAM L. FREEDMAN,
1204 Packard Building,
Philadelphia, Penna.
Attorney for Petitioner.

MORRIS WOLF,
1204 Packard Building,
Philadelphia, Penna.,
Of Counsel.

International, 311 Chestnut St., Phila.-Phila.

INDEX TO PETITION.

CITATIONS IN PETITION.

Cases.

Statute.

INDEX TO BRIEF.

CITATIONS IN BRIEF.

Cases.

CITATIONS IN BRIEF (Continued).

Cases.

Statutes.

IN THE

Supreme Court of the United States.

No. . October Term, 1942.

WILLIAM FOX,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of William Fox respectfully shows:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner and two others were indicted, charged with conspiring to obstruct justice. Petitioner pleaded guilty and testified for the government. Two trials of the co-defendants resulted in disagreements and the indictment was nolle prossed as to them. Petitioner twice moved,—pursuant to the agreement with the office of the Attorney General of the United States, under which he had pleaded guilty,—to withdraw his plea. The second such motion was joined in by the government. He also moved to vacate the conviction on the ground that the nolle prosequi left no basis for his conviction alone. His motions were denied and on August 4, 1942, the judgment was affirmed by the Circuit Court of Appeals for the Third Circuit.

The facts are as follows:

Early in 1941, petitioner was advised by Hugh A. Fulton, a Special Assistant to the Attorney General, that his transactions with Judge J. Warren Davis, and with one Kaufman, an attorney, were under investigation. Mr. Fulton informed petitioner that the government was willing to give him consideration provided he would tell all he knew about the matter and become a witness for the government (R. 59a-63a). On March 16, 1941, petitioner for the first time consulted an attorney and disclosed the entire matter to him, including the fact, as he later testified on the trials of his co-defendants, that he had been approached by Kaufman, soliciting loans on behalf of Davis, and that he had made such loans without any corrupt intent (R. 59a, 60a, 62a, 63a).

Petitioner's attorney then discussed with Mr. Fulton the suggestions which had been made to petitioner by the government. Before any decision was made as to the course to be taken, petitioner demanded to know what would be his situation if, after he made a statement, pleaded guilty to an indictment and testified against his co-defendants, they should not be convicted. Petitioner's attorney again conferred with Mr. Fulton and raised this question, stating that in such circumstance the withdrawal of the plea of guilty which petitioner was being asked to make was vital to petitioner's decision. Mr. Fulton assured petitioner's attorney that in such case the government would consent to withdrawal of the plea, and thereafter repeated such assurance to said attorney's partner (R. 69a). Induced by this assurance, petitioner agreed to do what was asked of him (R. 46a, 47a, 63a, 64a, 60a).

On March 21st petitioner's attorney advised Mr. Fulton that petitioner would plead guilty to the indictment

which at that time had not even been drawn (R. 47a). The next day petitioner made a written statement; thereafter he testified before the Grand Jury, and when the indictment was returned, pleaded guilty to it and later testified upon the trials (R. 64a, 65a).

The indictment, which was filed on March 28, 1941, charged that Davis, Kaufman and petitioner conspired among themselves and with other persons unknown, to obstruct justice (R. 8a-22a). The allegation as to persons unknown was purely formal matter, unsupported by any evidence either before the Grand Jury or on the trial (R. 81a, 82a). It was abandoned by the government upon the argument of the appeal and the Circuit Court took notice of this fact in its opinion (R. 95).

There were two trials of Davis and Kaufman, in both of which the juries disagreed (R. 59a).

At the trials petitioner testified for the government. His testimony was that Davis and Kaufman had approached him; that he had been requested to and had made loans to Davis; that he had not intended to bribe, corrupt, or in any way influence Davis (R. 63a, 65a).

On October 21, 1941, after the second disagreement, petitioner moved to withdraw his plea (R. 23a). The then government counsel, unaware of the stipulation made by Mr. Fulton, opposed the application and moved for sentence (R. 37a). The court denied petitioner's motion and sentenced petitioner to imprisonment for one year and a day and imposed a fine of $3,000 (R. 37a, 39a).

On October 31, 1941, pursuant to authorization theretofore given by the Attorney General on October 13, 1941, the government moved for a nolle prosequi of the indictment as against Judge Davis and Kaufman and judgment

of nolle prosequi was signed and filed on November 24, 1941 (R. 43a).

On December 1, 1941, petitioner again moved to withdraw his plea of guilty. At that time there was presented to the court a letter from Mr. Fulton, corroborating the agreement under which petitioner had pleaded guilty (R. 45a; 70a). Government counsel admitted that he had been unaware of the agreement when he opposed the first motion and stated that he would not have opposed it, had he known the facts, and did not now oppose it and that he had discussed the matter with the Attorney General who definitely desired that petitioner be allowed to withdraw his plea, and *"that the Attorney General joins in the request * * * to have the guilty plea withdrawn."* (R. 52a, 53a, 57a). This motion was also denied (R. 77a, 78a).

On January 28, 1942, petitioner moved to vacate the judgment of conviction and to dismiss the indictment against him upon the ground that the entry of judgment of nolle prosequi against his co-defendants had destroyed the basic requirement for a conviction of petitioner, alone, for conspiracy (R. 80a-83a). The District Judge denied the motion with an opinion (R. 84a-86a).

The Circuit Court of Appeals for the Third Circuit affirmed the judgment of the District Court on August 4, 1942 with an opinion (R. 94-100).

II. JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347).

The judgment to be reviewed is the judgment of the United States Circuit Court of Appeals for the Third Circuit entered August 4, 1942 (R. 100) affirming the judgment of the District Court for the Eastern District of Pennsylvania, filed October 22, 1941 (R. 42a).

III. QUESTIONS PRESENTED.

1. Where three persons are charged with conspiracy and all are before the court, can the conviction of one be sustained, the charge being nolle prossed as to the other two?

2. Where all the alleged conspirators are before the court and only one has been convicted, the guilt of the others not having been established, should the conviction of the one be sustained?

3. Was it proper to deny petitioner's application—joined in by the government,—for leave to withdraw the plea of guilty which had been made in reliance upon the government's consent to its withdrawal in the event (which occurred) that the co-defendants should not be convicted?

4. Were the petitioner's constitutional rights to stand trial, and against self-incrimination, given by the Fifth and Sixth Amendments, violated by the refusal of the District Court to enforce the promise made by the government to permit the withdrawal of the plea in the event (which occurred) that the co-defendants should not be convicted, which promise induced petitioner to waive his rights?

IV. REASONS FOR GRANTING THE WRIT.

(1) The decision of the Circuit Court of Appeals for the Third Circuit in the instant case, sustaining the convic-

tion of petitioner, is contrary to the principle relied upon by the Circuit Court of Appeals for the Second Circuit in *Feder v. United States,* 257 Fed. 694 (1919), wherein it was said at page 696:

> "Yet not only if one of two conspirators be acquitted must the other also be acquitted, but, even if the prosecution enter a nolle prosequi as to one, the other must be acquitted. State vs. Jackson, 78 S. C. 283, 24 Am. Rep. 476; Commonwealth vs. Edwards, 135 Pa. 474, 19 Atl. 1064."

This principle was approved by the Circuit Court of Appeals for the Fourth Circuit in *Miller v. United States,* 277 Fed. 721, 726 (1921).

The instant opinion of the Third Circuit, although disagreeing with the Second and Fourth Circuits, recognizes the conflict (R. 96):

> "We come then to the actual legal question presented in this appeal. Suppose there is a conviction of one named conspirator and a nolle prosequi as to the other and only the two are named. The South Carolina decision in State vs. Jackson, 7 So. Car. 283 (1876) squarely holds that a conviction under such circumstances cannot be sustained. This was approved obiter in the Second Circuit (10), and approved but the question left open by the Fourth Circuit (11).
>
> * * * * * *
>
> "The result of a conviction of one and a nolle prosequi of the others of named conspirators is not answered by any authority which we are bound to follow."
>
> "(10) Feder v. United States, supra.
>
> (11) Miller v. United States, 277 Fed. 721 (C. C. A. 4, 1921)."

(2) Where all the alleged conspirators are before the court and only one has been convicted,—the guilt of the others not having been established,—there is a sharp conflict between the Third Circuit in this case and various other Circuits as to the disposition of the case against the sole convicted defendant, which involves the very nature of the crime of conspiracy.

The Circuit Courts enumerated below, in accordance with the accepted common-law rule that conspiracy is an indivisible crime, hold that where all the alleged conspirators are before the court the guilt of at least two must be established. Consequently where one has been convicted and the guilt of the others has not been finally established,—whether because of acquittal, nolle prosequi or reversal on appeal even for procedural reasons,—the conviction of that one cannot stand.

2nd Circuit:

Feder v. United States, 257 Fed. 694 (1919).

4th Circuit:

Williams v. United States, 282 Fed. 481, 484 (1922);
Miller v. United States, 277 Fed. 721, 726 (1921).

5th Circuit:

Cofer v. United States, 37 Fed. (2nd) 677, 680 (1930).

7th Circuit:

Bartkus v. United States, 21 Fed. (2nd) 425, 428 (1927).

8th Circuit:

Turinetti v. United States, 2 Fed. (2nd) 15, 17 (1924);

Morrow v. United States, 11 Fed. (2nd) 256, 260 (1926);

Silk v. United States, 19 Fed. (2nd) 73 (1927).

The Third Circuit in the present case, has applied a different rule and has held that one alone may be convicted, so long as the remaining defendants have not been acquitted or the decision in their favor is such that they can again be brought to trial.

(3) The effect of a nolle prosequi, as to all except one defendant in a conspiracy case, upon the conviction of the remaining defendant, is an important question of Federal criminal law which does not appear to have been, but should be, settled by this Court.

(4) The refusal in this case to permit petitioner to withdraw his plea of guilty conflicts with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Ward v. United States,* 116 Fed. (2nd) 135 (1940). In that case it was held to be an abuse of discretion to refuse to permit the defendant to withdraw a plea of guilty, entered in reliance upon an agreement with government counsel that he would recommend a light sentence, where the court imposed a heavy sentence.

(5) The right of a defendant to withdraw a guilty plea under the circumstances of this case is an important question of federal criminal law which does not appear to have been, but should be, passed upon by this Court.

(6) This Court should determine whether it is not in the interest of public policy and the proper administration

of justice that a defendant who waives his right to trial and his constitutional privilege against self-incrimination in reliance upon a promise by the government and who cooperates with the government under the circumstances of this case should be given the opportunity of withdrawing his guilty plea.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit directing said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said Circuit Court, had in the case numbered and entitled on its Docket Calendar No. 7867, "United States of America, Appellee against William Fox, Appellant" to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

WILLIAM FOX,

By ABRAHAM L. FREEDMAN,
Attorney.

MORRIS WOLF,
Of Counsel.